

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS (Boston)

3 No. 1:23-cv-10511-WGY

4
5 UNITED STATES OF AMERICA, et al,
6 Plaintiffs

7 vs.

8
9 JETBLUE AIRWAYS CORPORATION, et al,
10 Defendants

11 *****

12
13 For Zoom Hearing Before:
14 Judge William G. Young

15 Scheduling Conference

16
17 United States District Court
18 District of Massachusetts (Boston)
19 One Courthouse Way
20 Boston, Massachusetts 02210
21 Tuesday, March 21, 2023

22 *****

23 REPORTER: RICHARD H. ROMANOW, RPR
24 Official Court Reporter
25 United States District Court
One Courthouse Way, Room 5510, Boston, MA 02210
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1 P R O C E E D I N G S

2 (Begins, 10:00 a.m.)

3 THE CLERK: Civil Matter 23-10511, the United
4 States of America, et al versus JetBlue Airways Corp.,
5 et al.

6 THE COURT: Good morning counsel, thank you for
7 attending on this session of the court. This is an
8 initial case management scheduling conference held
9 pursuant to Rule 16.1 of the local rules of the District
10 of Massachusetts. At your request we're holding it on
11 this zoom platform.

12 Our host for the conference is Courtroom Deputy
13 Clerk, Jennifer Gaudet, the proceedings are taken down
14 by our Official Court Reporter, Rich Romanow, and I have
15 law clerks on the line.

16 The proceedings, as all such proceedings, are open
17 to the public, various members of the public are
18 present, and you are all welcome. I do remind you that
19 you must keep your microphone muted and the rules of
20 court remain in full force and effect, and that means
21 there is no taping, streaming, rebroadcast, screen
22 shots, or other transcription of these proceedings.

23 With that said, could I ask counsel to introduce
24 themselves, starting with the United States, and then
25 the other plaintiffs, and then we'll go to JetBlue and

1 Spirit.

2 MR. DUFFY: Thank you, Judge Young. This is
3 Edward Duffy for the United States, and I'm also joined
4 by John Briggs.

5 THE COURT: And good morning to you.

6 MR. BRIGGS: Good morning, your Honor.

7 THE COURT: And for the other plaintiffs?

8 MR. MATLACK: Good morning, your Honor, William
9 Matlack for the Commonwealth of Massachusetts, and with
10 me is Daniel Leff.

11 THE COURT: And, Mr. Matlack, good morning.

12 MR. LEFF: Good morning, your Honor.

13 MR. MARGRABE: Good morning, your Honor, this is
14 William Margrave from the Office of the Attorney General
15 for the District of Columbia.

16 THE COURT: And good morning to you, sir.

17 MS. KOGAN: Good morning, your Honor, Olga Kogan
18 on behalf of the State of New York.

19 THE COURT: And good morning to you, ma'am. Very
20 well.

21 And for JetBlue?

22 MR. SHORES: Good morning, your Honor, this is
23 Ryan Shores, from Shearman & Sterling, on behalf of
24 JetBlue Airways Corporation. Also here for JetBlue is
25 Richard Schwed, Ethan Glass, and Elizabeth Wright.

1 THE COURT: And good morning to you all.

2 MS. WRIGHT: Good morning, your Honor.

3 MR. RUDMAN: Good morning, your Honor, this is Sam
4 Rudman from Choate, Hall & Stewart on behalf of Spirit
5 Airlines.

6 THE COURT: And good morning to you.

7 MR. RUDMAN: Your Honor, it's my pleasure to have
8 with me five members of the Paul Weiss team, who will be
9 taking the lead for Spirit in this matter. I'm joined
10 this morning by Jay Cohen.

11 MR. COHEN: Good morning, your Honor.

12 THE COURT: Good morning.

13 MR. RUDMAN: Andrew Finch.

14 MR. FINCH: Good morning, your Honor.

15 MR. RUDMAN: Eyitayo St. Matthew-Daniel.

16 MS. ST. MATTHEW-DANIEL: Good morning, your Honor.

17 MR. RUDMAN: Meredith Dearborn.

18 MS. DEARBORN: Good morning.

19 THE COURT: Good morning.

20 MR. RUDMAN: And Kate Wald.

21 MS. WALD: Good morning, your Honor.

22 THE COURT: And good morning. Welcome to you all.

23 I look forward to working with you. I very much
24 appreciate the work you have already put in giving me
25 this joint-proposed agenda and your motion for entry of

1 protective order and we'll deal with them.

2 My usual practice in an initial case management
3 scheduling conference -- and I'm going to follow it
4 here, is to notify you that I have no pride of place and
5 that should you wish to proceed -- you'll have to agree,
6 but should you wish to proceed before a magistrate
7 judge, I am perfectly amenable to that. But you all
8 have to consent to that. In this case, again by random
9 selection, as I was selected, the magistrate judge who
10 is available is Magistrate Judge Judith Dein. I can
11 tell you that she is a superb jurist.

12 When I normally do this, I tout the advantages of
13 magistrate judges by saying that, since they don't
14 usually try criminal cases, maybe they would give you a
15 fixed trial date. I have to say that I'm prepared to
16 give you a fixed trial date. So in that respect I don't
17 know -- well she's a much better judge, I'm sure, than
18 I, but that is something that I follow routinely and I
19 would be remiss if I did not do it here.

20 Do any of you want to think about that or are we
21 clear that you want to proceed in this session of the
22 court?

23 MR. DUFFY: Your Honor, I think I can say, for the
24 United States, that we would like to proceed in front of
25 you, Judge.

1 THE COURT: Very well, then that's how we'll do
2 it.

3 MR. SHORES: I'm sorry to interrupt, your Honor, I
4 was just going to say, for the defendants, we're in
5 agreement, we would like to proceed before your Honor.

6 THE COURT: Well we need not have choruses of
7 people wanting to proceed before me, because one is
8 sufficient. You'd all have to agree to go before Judge
9 Dein. But I'm perfectly prepared to handle the matter
10 and look forward to it.

11 Now I meant what I said about your joint-proposed
12 agenda, that's very helpful, and let me take up
13 Paragraphs 1 and 2 together.

14 Candidly, when I learned that you were seeking
15 expedited treatment for this matter, I was delighted.
16 Frankly I'm thinking of the month of October. The
17 government agencies want November really. If we do it
18 in November -- again none of these things are fixed
19 until I've heard from you, but let me ruminate a bit.

20 If we do it in November, it's going to certainly
21 last over five weeks because of the Thanksgiving
22 holiday. You want four weeks of trial, that's 20 trial
23 days. I'm prepared to pick a date and give you
24 day-by-day 20 trial days thereafter, which is the most
25 efficient way to proceed, absent national holidays, and

1 should I have a doctor's appointment, then maybe we
2 couldn't sit, but I would then just tack that on to the
3 end. So you get 20 days all together, which I should
4 think would be advantageous.

5 If we get it done -- if we do it in October and
6 get it done in October, that gives me -- again I think
7 have an obligation to you, um, reasonably till the end
8 of the year to render a decision, and as I understand
9 it, this proposed merger is to close in 2024. So that
10 would be a expeditious and reasonable time.

11 If we do it in November, well then it's going to
12 take five weeks at least and, um, I'm into December and
13 there's holidays in December, so at best I doubt that I
14 would be able to render a decision before January.

15 On the other hand, um, certainly a November trial
16 date, a fixed trial date and I'm not continuing it, is
17 expeditious treatment for a matter of this sort, and if
18 the government needs that amount of time, I'm not going
19 to press back strongly against it. It does, um, signal
20 to me that the government anyway are not going to be
21 moving for summary judgment here.

22 But let me hear the government. How about doing
23 this in October?

24 MR. DUFFY: So, your Honor, I appreciate, you
25 know, two things, your willingness, as I understand it,

1 to hold the trial open for a date certain, which I think
2 would be beneficial.

3 The government's position is that, for this
4 particular transaction, as your Honor alluded to, the
5 outside closing date is not until July of 2024, so that
6 is considerably longer than the vast majority of merger
7 cases that are brought, and that removes the source of
8 exigency that often results in merger trials occurring
9 fairly close after the filing of the complaint.

10 In this particular case there are circumstances
11 that, in the opinion of the government and the
12 plaintiffs state, militate in favor of a considerably
13 longer discovery period, and there's two particular
14 factors that I would like to focus your Honor's
15 attention on.

16 The first is, as the Court is presumably aware,
17 the Northeast Alliance Transaction that JetBlue is
18 involved with with American Airlines, that alliance is
19 the subject of litigation that is before Judge Sorokin,
20 and we anticipate that there will be a decision
21 regarding the NEA case sometime in the next few weeks or
22 months. That decision, and also the business decision
23 that JetBlue takes in response, will be particularly
24 important during the discovery period. We will need to
25 see how JetBlue's network evolves and how their business

1 strategies may change.

2 THE COURT: Well wait. I recognize that you have
3 a valid reason. You're telling me that it would be very
4 difficult for you to go to trial starting not on the
5 30th of October, but say on the 2nd of October?

6 MR. DUFFY: Well I think the 2nd, yes, your Honor,
7 would be a -- would pose considerable hardship and
8 prejudice on the government for the reasons I mentioned
9 regarding the NEA and the need to take discovery on
10 that, and also the fact that JetBlue is pursuing
11 divestiture negotiations with a few other airlines and
12 that those divestitures will be an important proposed
13 remedy for the Court to consider. We need to take
14 discovery on the divestiture buyers and various things
15 and we can't really do that until those negotiations are
16 completed. So we think that in --

17 THE COURT: Wait. Wait. One of the problems with
18 the zoom hearing is I am more abrupt necessarily than
19 were we together in the courtroom or in my conference
20 room, and I apologize for that. But as I said, I'm not
21 pressing you, November is not an unreasonable time for a
22 case of this magnitude.

23 But I should hear the government. If I were
24 willing to start this case, as the government's
25 proposed, on the 30th of October, run for the next 20

1 trial days, with the possible exceptions that I
2 mentioned, that gives you a pretty expedited hearing,
3 doesn't it?

4 MR. DUFFY: It does, your Honor.

5 THE COURT: No, no, no, now I want JetBlue.
6 That's exactly what you want. I've read what you want.

7 MR. SHORES: Good morning, your Honor, Ryan
8 Shores.

9 Yes, we appreciate your Honor considering a trial
10 in October. From our perspective we're ready to push
11 this case to trial on an expedited basis. And I think
12 one thing that we have to keep in mind here is we're not
13 starting from scratch.

14 THE COURT: Mr. Shores, I'm fully aware of that.
15 None of this is a surprise to you and, um, believe me I
16 am all for expedition. But with that said, I have to be
17 reasonable.

18 MR. SHORES: Understood, your Honor. And the
19 parties have agreed to five months of discovery, and
20 five months of discovery plus, you know, an additional
21 month is plenty of time to do discovery in this case and
22 get it ready for trial, and if you take that schedule
23 into account, we would be in trial in September.

24 Now Mr. Duffy mentioned the outside date and I
25 just want to be clear about that. That's the final day

1 by which the agreement will be void if there is not
2 clearance or approval of this transaction. But
3 everybody's got an interest in getting a resolution to
4 this matter much in advance of that. We believe this is
5 a procompetitive transaction, it's good for consumers,
6 it will shake up the airline industry, and so it should
7 be approved on an expedited basis.

8 But even if -- even if the government's right and
9 it's going to be bought, then we also have an interest
10 in learning that early so we can proceed as a company,
11 and our employees, on a standalone basis. And I also
12 point out that your Honor does have to have time to
13 write a decision, as you mentioned, and if your Honor
14 rules against us, we would want to have time for an
15 appeal.

16 So the outside date to us is not the relevant date
17 here, the relevant question is how quickly can we get to
18 trial in a fair way? And since the government has
19 already conducted an extensive pretrial investigation,
20 we've turned over millions of documents, third-parties
21 have -- already the government's done discovery around
22 third-parties, including on the divestiture issues that
23 Mr. Duffy has already mentioned, we don't believe
24 there's any reason we need to wait until after
25 September, and this case will be trial-ready in

1 September.

2 And let me just mention, because Mr. Duffy brought
3 it up, this divestiture issue, so your Honor understands
4 --

5 THE COURT: Well let me say, um, September is not
6 on the table, there's another player here and it's the
7 United States District Court, my trial calendar is
8 filled in September, cases already set. Now I recognize
9 the public importance of this case, but I have cases of
10 public importance, one specially assigned out of the
11 Western District of North Carolina, another significant
12 criminal case that's already been up to the Court of
13 Appeals. So it's not September, the choice is October
14 or November.

15 So the difference is between starting on the 2nd
16 of October or starting on the 30th of October, that's,
17 um, five-weeks difference. Given what the government
18 says -- and believe me, once I've picked the date, we're
19 going to hold to it, no one's going to get a continuance
20 then, we're going to go to trial on the date.

21 Is it so unreasonable to start on the 30th of
22 October?

23 MR. SHORES: Well, your Honor, from defendants'
24 perspective we want to start as soon as possible, and
25 these merger trials often are done on a very expedited

1 basis, sometimes they go from complaint to trial in a
2 matter of a few months. And here, your Honor, all we're
3 asking for is to start in approximately 6 -- if it goes
4 into October, it would be 7 months for a trial.

5 I'll give you some examples. The recent **United**
6 **States vs. United States Sugar** in the District of
7 Columbia went to trial in approximately --

8 THE COURT: I understand that and I certainly
9 respect those judges. But I've told you, we're not
10 going to trial in September, the trial calendar is
11 filled. We're going to trial in October. Now it would
12 seem -- maybe what I ought to do is start in the middle
13 of October.

14 We'll turn to the United states. If I moved it up
15 a couple of weeks, started on the 16th of October, how
16 is that?

17 MR. DUFFY: Your Honor, there's one additional
18 issue and I have a proposal that might work. We do have
19 some witness availability issues, expert witnesses
20 potentially, um, that would not be available until the
21 later part of October.

22 THE COURT: You know, let me interrupt you and
23 say, I am supremely disinterested in that.

24 MR. DUFFY: Understood.

25 THE COURT: You know an expert witness should

1 accommodate -- a witness whom you are paying should
2 accommodate him or herself to the Court's schedule and
3 the public's interest, and also we can receive testimony
4 by deposition.

5 What do you say to the 16th of October?

6 MR. DUFFY: Your Honor, I think our position would
7 be October 23rd would give us enough time to complete
8 the trial prior to Thanksgiving. It would give us, um,
9 you know an additional week of discovery on these
10 divestiture issues, and the ability to take discovery
11 after the NEA decision is important.

12 So I think our position would be the 23rd would be
13 workable. If not, a trial later, whether it be December
14 or January, would be workable, and I don't know, you
15 know, what prejudice defendants would suffer with the
16 later trial date.

17 THE COURT: Well I thought you people wanted
18 expedition?

19 MR. DUFFY: I think the defendants want
20 expedition, we don't want to, um, delay the trial any
21 more than is necessary, and I think a later October
22 trial date, in our view, is a position we put forward to
23 defendants as a compromise that would prevent
24 significant prejudice to the government's case.

25 THE COURT: All right, here's what we're going to

1 do.

2 Trial will commence on Monday the 16th of October
3 and run 20 trial days thereafter. The Court is going to
4 clear its schedule for the next four weeks starting on
5 the 16th of October for the trial. Tentatively we --
6 and you set forth in your Paragraph 2, we will try it
7 five days a week, 9:00 till 1:00, we'll handle legal
8 issues in the afternoons, um, we'll split the time 50/50
9 between the parties just as you propose. That's the
10 order of the Court.

11 Now let's work back from there. If we're going to
12 start on the 23rd of October, then -- you talk about
13 discovery in Paragraph 3 and you're negotiating a joint
14 case management order, so could I have the proposed
15 order in two weeks time from today? How do the parties
16 feel about that?

17 MR. SHORES: Your Honor, could I just make a
18 clarification? Did you say October 16th for the trial
19 date? That's what I understood.

20 THE COURT: That's what I said.

21 MR. SHORES: Okay, thank you, your Honor.

22 Yes, we can work expeditiously with the government
23 and get a CMO next week, your Honor.

24 MR. DUFFY: Agreed, your Honor.

25 (Pause.)

1 THE COURT: Two weeks are fine by me, but I will
2 certainly accept it in a week's time, but any time
3 within the next two weeks.

4 Now let me say a word about that. You need not
5 agree to discovery limitations and the dates and those
6 matters which ought be in such a proposed order, but I
7 want a single order where the plaintiffs set forth their
8 position and the defendants set forth their position,
9 and then I learned this from Judge Keeton, like a
10 baseball arbitrator I will choose the most reasonable.
11 I will not micromanage this case. So on each discrete
12 dispute, I will choose what seems to the Court the most
13 reasonable.

14 So it's been my experience that when you give
15 competent counsel both the incentive to be reasonable
16 and the option to be reasonable -- and you're all
17 displaying it and believe me I respect it, I really do
18 look forward to working with you, I need do nothing but
19 endorse the order, and that's hopefully what I'll do
20 here.

21 I'll expect -- and your proposal doesn't mention
22 this but I want it in the pretrial -- strike that, in
23 the case management proposal, a time for the filing of
24 dispositive motions, and I would -- given since we're
25 going to go in the middle of October for trial, any

1 dispositive motions must be filed by, at the latest, on
2 August 1st with -- that's Tuesday the 1st of August,
3 with responses as the rules require within 21 days. I
4 give those motions oral hearings and I treat them very
5 seriously and we will, um, resolve those motions in the
6 month of September.

7 No later than, um, let's see, no later than Friday
8 the 15th of September, you will file your joint pretrial
9 memorandum. In this court that's a very involved
10 document that sets forth all your exhibits, sets forth
11 all your witnesses and the like, and then the Court will
12 schedule timely a final pretrial memorandum -- a final
13 pretrial conference under Rule 16 in advance of the
14 October 16th trial commencement date.

15 Again following your proposal here, in Paragraph 4
16 you mention the protective order that you have
17 negotiated. I have today allowed that order as you have
18 jointly submitted it.

19 I remind you, under its provision, you are not to
20 file anything with this court without making a separate
21 motion for sealing on the appropriate authorized ground.
22 Something does not become subject to sealing simply
23 because, um, in order for you to exchange it, you have
24 agreed to treat it as confidential. I'm all in favor of
25 your cooperation, but court proceedings are public

1 proceedings and there must be a separate motion to file
2 and I will deal with those motions.

3 And those motions are not to cite the protective
4 order as grounds for sealing. This is a standard that
5 you have adopted, it's entirely different, I adopt it
6 for your exchange of information, but not for filing
7 things in court. And I will tell you, I'm skiddish
8 about sealing anything from the public record.

9 I commend to you really an excellent recent
10 article by Professor Gustavo Ribeiro in the Denver Law
11 Review, I'm sorry I can't give you a more precise
12 citation.

13 Now that takes care of -- Oh, you mentioned a, um,
14 supposedly or perhaps related case. I don't have the
15 parties before me, I don't speak to that case in any
16 way, but I thank you for the information. Should I have
17 to address it, I will. I do accept, as you've properly
18 pointed out to me, that the dates that you have -- and
19 times you have proposed deal with the case presently
20 assigned to me and not this other purported related
21 case.

22 Now I have really only one other area that I would
23 like to raise on this initial case management scheduling
24 conference and then I am open to any questions that you
25 may have that will assist in our smooth preparation for

1 the trial of this matter, and that has to do with
2 experts.

3 I expect any expert that you proffer under Federal
4 Rule of Evidence 702 to -- the rule requires that that
5 expert prepare a report, and I know you'll comply with
6 that and I know that the report will set out the, um, as
7 the rule requires, the payment relations of that expert
8 as well as the cases in which that expert has been
9 involved for sometime prior to this case. But here are
10 the specific requirements that I want to apprise you of.

11 I want docket numbers in those other cases so that
12 you can go and look and see what that expert may have
13 said on some other occasion. Likewise when it comes
14 time for that expert to testify, I want those reports to
15 be at the level of exquisite detail of a patent claim
16 because no expert is going to say anything that is not
17 included in the expert report, and that means every
18 diagram, every spreadsheet, every projection, every bit
19 of data that the expert is going to put before the Court
20 must be in that report. And it is an evidentiary
21 objection if the expert gets on the stand and she's
22 testifying and she says something and the other side
23 says "Well that's not in the report," and then I will
24 look at it and we will all look at the report and we'll
25 see if it is, and if it's not, I'm not hearing it.

1 That's the only fair way.

2 Also I expect -- though this is a matter that we
3 will discuss in detail at the final pretrial conference,
4 that I will not have more than one expert per discipline
5 here. I'm not looking to a trial with a battery of
6 experts telling me the same thing and reinforcing each
7 other. It seems to me the rule of one expert per
8 discipline is a salutary rule.

9 Beyond that I think you people are very
10 well-prepared to go forward here and I should be quiet
11 and we'll just go through counsel to let you raise any
12 issues or ask any questions that I have not touched on.
13 Again we'll start with the United States and touch on
14 the other plaintiffs and then JetBlue and Spirit.

15 The United States?

16 MR. DUFFY: Yes, your Honor, two questions
17 relating to expert issues.

18 The first is, typically does the Court receive the
19 expert report into evidence?

20 THE COURT: No.

21 MR. DUFFY: Okay.

22 The second question. I wanted to just follow up
23 on the point you raised about preferring one expert per
24 discipline. Can you just -- can the Court give a little
25 bit more, um, I suppose explanation as to how you would

1 understand "discipline" to be in the context of this
2 type of case?

3 THE COURT: That's a great question but the truth
4 is, um, I can't, because I think I would be premature.
5 You people -- I don't want to hear the same thing from
6 more than one purported expert. And so, you know, it's
7 probably too broad to say, "Well I only want one
8 economist," but, um, I am not clear how -- what the
9 ranges of expertise are and that really -- at least in
10 my practice, is a matter that is thrashed out at the
11 final pretrial conference, um, and honestly I can't give
12 you a better guide than that. That's an honest answer.

13 Does that explain the Court's position?

14 MR. DUFFY: I think so, your Honor. I appreciate
15 it.

16 THE COURT: All right.

17 JetBlue, questions, um, other issues?

18 MR. SHORES: No questions and no other issues,
19 your Honor, I appreciate the guidance on the experts and
20 definitely we'll keep that in mind as we go forward and
21 appreciate the Court's time today.

22 THE COURT: When you say you appreciate the
23 Court's time, I'm reminded of a great judge whom I was
24 privileged to know personally, Henry Friendly, lawyers
25 so frequently say that, and the great Judge Friendly

1 would say, "Well that's what they pay me for," and of
2 course that's true. And that's what they're paying you
3 for. I look forward to working with you.

4 All right. Spirit?

5 MR. FINCH: Thank you, your Honor, we have nothing
6 further and we look forward to working with you as well.

7 THE COURT: I too.

8 Well thank you all. So I'll expect the proposed
9 case management order within 14 days, but sooner if you
10 get it together. And I thank you all very much. We'll
11 stand in recess.

12 (Ends, 10:35 a.m.)
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C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER,
do hereby certify that the foregoing record is a true
and accurate transcription of my stenographic notes
before Judge William G. Young, on Tuesday, March 21,
2023, to the best of my skill and ability.

/s/ Richard H. Romanow 03-23-23

RICHARD H. ROMANOW Date